No. 80-1665

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In the Supreme Court of the United States

OCTOBER TERM, 1980

ELIJAH W. RATCLIFF, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioner seeks review of the decision below in this federal income tax case denying his claimed deductions with respect to the condemnation of property in which he asserted an interest, and upholding the Commissioner's imposition of an addition to the tax under 26 U.S.C. 6653(a), on the ground that petitioner's understatement of tax due was a result of his negligent or intentional disregard of tax rules and regulations.

The pertinent facts may be summarized as follows: On his federal income tax return for 1971, petitioner claimed a casualty loss deduction of $12,500 for certain real estate allegedly lost through condemnation without compensation. He also claimed a business loss of $14,583.33, related to the operation of a corporation, Lake Livingston Washateria, Inc., in which he was a shareholder. On audit, the Commissioner disallowed both deductions, and also imposed an addition to the tax under Section 6653(a) of the

Internal Revenue Code of 1954 (26 U.S.C.), on the ground that all or part of petitioner's understatement of tax for that year was due to negligence or intentional disregard of the tax rules and regulations (Pet. App. 27, 41).

In this proceeding brought by petitioner in the Tax Court for redetermination of the ensuing deficiency, the Tax Court upheld the Commissioner's determinations (Pet. App. 43). The court of appeals affirmed on the basis of the Tax Court's opinion (Pet. App. 44-45).

1. Petitioner challenges (Pet. 6-18) the Commissioner's disallowance of his claimed casualty loss deductions, arguing (Pet. 6-7) that in the course of condemnation litigation he had acquired an interest in the real property in question and therefore suffered a $12,500 loss when a local court in 1971 dismissed a suit seeking damages for the condemnation. Petitioner, a now-disbarred attorney, contends (see Pet. App. 28) that he had represented certain individuals in several earlier state court actions relating to the condemnation as well as in the suit dismissed in 1971, and that his interest in the property arose from oral promises by those persons to give him part of their interest in the property in return for his services. Petitioner further contends (Pet. 12-18) that in 1971, he donated 75 percent of his interest in the real property to Lake Livingston Washateria, Inc., that the condemnation caused a $37,500 loss to Washateria, and that the loss "passed through" the corporation to him personally because Washateria was an electing "Subshapter S" corporation under Section 1371 *et seq.* of the Code.

But the decision below correctly denied petitioner's claimed deductions. As the Tax Court found, petitioner failed to prove the he ever possessed any interest in the real property, the condemnation of which allegedly gave rise to the claimed losses (see, *e.g.*, Pet. App. 32). For example, petitioner claimed to have acquired his interest as a result of

representing certain parties in litigation, but the records of most of those legal proceedings do not even show him as counsel of record (Pet. App. 26, 29-30). Indeed, since petitioner admitted that there never existed any written document showing his acquisition of a property interest, his claim not only fails for lack of proof, but also as a matter of law because Texas law does not recognize oral conveyances of land. (See Pet. App. 30-32; Tex. Rev. Civ. Stat. Ann. art. 1288 (Vernon 1980 & Cum. Supp. 1980); *Pappas* v. *Gounaris,* 158 Tex. 355, 311 S.W. 644, 645-646 (1958).) Finally, the record does not show either the amount of the losses or the year in which they allegedly occurred. There is accordingly no factual support for petitioner's claimed deductions relating to the condemnation of the property ir question.

Moreover, petitioner's claim to an additional deduction passing through the corporation Washateria is similarly defective because he failed to establish that Washateria, which owned nothing more than 75 percent of whatever interest in the property petitioner previously had, ever possessed any interest in the property (Pet. App. 40). Further, even if Washateria had suffered a loss, petitioner was not entitled to deduct a share of the loss on his personal return because the evidence did not show that the corporation made a timely Subchapter S election (see Pet. App. 35-40).

2. Petitioner also contests (Pet. 19-21) the Commissioner's imposition of a five percent addition to his taxes on account of his negligence or intentional disregard for the tax rules in filing his return under Section 6653(a) of the Code. However, the fact that petitioner, then an attorney, claimed such dubious deductions in an amount large enough to completely eliminate his entire tax liability for the year in question, and then failed to produce any records to support those deductions (see Pet. App. 41-42), was more than sufficient to justify the imposition of the addition to

the tax. *Wexler* v. *Commissioner*, 241 F. 2d 304, 305 (6th Cir.), certiorari denied, 354 U.S. 938 (1957); *Cooper* v. *Commissioner*, 542 F. 2d 599, 601-602 (2d Cir. 1976).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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